

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
A National Broadband Plan for Our Future)	GN Docket No. 09-51

Comments of the AdHoc Telecommunications Users Committee

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Summary

The *NOI* observes that high speed Internet access service is important to many different aspects of contemporary life. The *NOI* implicitly finds that the service is infused with the public interest, just as other services were at earlier times. Relying on the market to offer high speed Internet service at reasonable rates, terms and conditions should be the preferred course. When the market, however, fails, government intervention is justified.

Determining what service is available where is the first step. Ongoing Commission and GAO efforts will help inform the record of this proceeding. The Commission should know where the market has failed before it determines the extent to which USF or other government assistance is needed.

The next step is for the Commission to prescribe the “core level” of service needed to advance the public interest. In so doing the Commission should not try to future-proof broadband Internet service, and should be mindful of fiscal constraints. The service has evolved and will continue to evolve. The core level of service at this point should be sufficient to provide access to Internet-based educational, social, commercial, and health opportunities, but should not be so expansive that it includes capacity designed to compete with contemporary cable television systems.

If the market has failed to make broadband Internet service available in communities, the Commission should be skeptical of provider claims that they will deploy the service if the Commission assures them that it will not impose “open access” requirements. A string of broken promises suggests that regulatory compromises and inducements do not result in promised investments.

Experience in other countries suggests a different approach. If broadband Internet service is characterized by natural monopoly conditions in some locales, subsidization of multiple suppliers will increase the per-subscriber cost of making the service available. Rather than subsidizing multiple providers, a more sensible and cost-effective approach would use a technology neutral auction to award subsidies to single providers of last resort in such areas. Because the market has failed in these circumstances, the Commission cannot reasonably rely on market forces to govern the rates, terms and conditions under which providers offer high speed Internet service. Because of past decisions, the Commission may have difficulty imposing direct economic regulation on providers of the service even though the service is, according to the Commission's own statements, infused with the public interest. The Commission should, however, consider requiring "open access," as has been done in other countries with great success. If "open access" cannot be squared with the Communications Act, legislation should be considered. Good ideas can come from all over the world.

Finally, the Commission needs to meet its responsibilities. The Commission has failed to oversee adequately USAC's administration of the USF, and as a consequence, USF monies may have been wasted. The Commission also has tried to avoid the problem of excessive special access rates; and, as a consequence, has contributed to the high cost of broadband Internet service in rural areas.

AdHoc urges the Commission to be pragmatic. It should rely on actual data and sound analysis, rather than being driven by policy preferences, and should acknowledge real constraints in its efforts to widen the availability of high speed Internet service.

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The AdHoc Telecommunications Users Committee (“AdHoc”) hereby submits its comments in response to the Commission’s April 8, 2009 Notice of Inquiry (“*NOI*”) in the above-captioned docket.¹

I. The Market Place and Regulation Should Play Important Roles In Making Broadband Internet Service More Available

First principles should guide the Commission as it considers the overarching question in this proceeding. The Commission should not focus on satisfying any particular party(s) or on reaching a “compromise” negotiated by and with industry players. Rather, in this context the Commission’s focus should be on determining the most effective and efficient mechanisms for increasing access to high speed Internet services for all the people of the United States.

AdHoc submits that the Commission should rely to the maximum extent feasible on competition to deploy broadband Internet service and to assure that consumers have access to the service under reasonable terms. If effective facilities-based competition for broadband Internet service customers exists in particular communities, the

¹ *A National Broadband Plan for Our Future*, GN Docket No. 09-51, FCC 09-31, released April 8, 2009.

Commission should play only a limited role. Subject to anti-trust and unfair competition laws, an effectively competitive marketplace generally can regulate the rates, terms and conditions under which providers offer high speed Internet service. Even in an effectively competitive market, the Commission, of course, still would oversee the disbursement of Universal Service Fund (USF) money to support provision of USF eligible services to low income subscribers, schools and libraries and to rural health care providers.

In the absence of effective facilities-based competition, however, the Commission should play a much larger role. The *NOI* finds that high speed Internet access service is far more than a mere “nice to have” service.² High speed Internet service is changing educational, commercial, medical and social aspects of American society, and the Commission’s goal must be, “[f]or every American citizen and every American business to have access to robust broadband services.”³ In effect, the Commission has found that high speed Internet access service is infused with the public interest.⁴ These findings carry obvious implications for the Commission’s role in using the Universal Service Fund (USF) and possibly other revenue sources to support deployment of high speed Internet service. These same findings also require Commission intervention when the market for high speed Internet service is not effectively competitive. If not in this proceeding, the Commission eventually must

² The first paragraph of the *NOI* observes, “High-speed ubiquitous broadband can help to restore America’s economic well-being and open the doors of opportunity for more Americans, no matter who they are, where they live, or the particular circumstances of their lives. It is technology that intersects with just about every great challenge facing our nation.”

³ *NOI*, at ¶¶ 4, 5 and 13

⁴ See generally, *Munn v. Illinois*, 94 U.S. 113 (1877); B. Schwartz, *The Economic Regulation of Business and Industry* (1973).

determine the extent to which it should intervene if marketplace forces do not effectively govern those matters.

Sound decision-making springs not only from sound first principles, but also from an objective view of marketplace conditions. The Commission should not confuse hope for reality. Actual marketplace conditions, not policy preferences, should guide the Commission's decisions in this proceeding – that also should be a first principle in this and other Commission proceedings.

II. Before it can Implement an Effective Universal Broadband Program, the Commission Must Determine the Level of Broadband Internet Service to Support, and Should Carefully Evaluate Competitive Conditions in the Relevant Markets.

As with earlier universal service efforts, the Commission's first step must be to determine the level of the broadband Internet service that – based on fiscal and other public interest considerations – should be “accessible.”⁵ While the Commission may have a mandate to universalize access to broadband Internet service, it does not have at its disposal unlimited economic resources to subsidize broadband Internet service. The Commission should look for practical approaches first to subsidize service to “unserved” areas and then to improve service to under-served areas when the information available to the Commission suggests that the market will not provide the desired level of service without government directed subsidies. This approach necessarily means that the Commission should first assess where broadband Internet service already

⁵ See, e.g., *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776 (1997); *High-Cost Universal Service Support*; *Federal-State Joint Board on Universal Service*; *Lifeline and Link Up*; *Universal Service Contribution Methodology*; *Numbering Resource Optimization*; *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*; *Developing a Unified Intercarrier Compensation Regime*; *Intercarrier Compensation for ISP-Bound Traffic*; *IP-Enabled Services*, FCC LEXIS 7792 at *51.

exists or is likely to become accessible by virtue of private, competitive market forces, without the need for subsidy or other forms of government intervention. The Commission should employ subsidies only when they are required to achieve the desired level of access to high speed Internet service. Finally, the Commission must evaluate whether the broadband Internet access options available to consumers in a given market result in effective competition. If not, the Commission should intervene to create an environment conducive to providing reasonably priced high speed Internet service.

A. Designating the “where” and “what” of access to broadband Internet service

As the *NOI* appropriately recognizes, making broadband Internet accessible to all customers does not require that a “one-size-fits-all” service exist at every location.⁶ Reasonable distinctions can and should be made, based on available resources and the functionality that customers require to make productive use of the Internet. For example, while it would be reasonable for a regional health center serving a rural community to have access to a level of broadband service that would enable it to access advanced telemedicine applications, households in the same community would obviously not require an equivalent service. Similarly, the broadband capability that would allow a small branch office to conduct business over the Internet would not meet the needs of a large corporate headquarters location. The Commission should not determine the level of broadband access to Internet service for all potential subscribers in a community, based on the highest capacity needed for a particular application.

⁶ *NOI*, at 23-24.

Establishing benchmarks for broadband access that should be available to all Americans requires reasonable distinctions between requirements of different types of customers.

Access to a core level of broadband Internet service is one thing; access to a premium level of service that, for example, would enable linear delivery of multiple channels of video entertainment programming is another matter. Resources are limited. The Commission should focus on making available a level of Internet service that advances public interest objectives, such as innovation, education, telecommuting, medical care, public safety, and first response capabilities. With core broadband infrastructure in place, providers and customers would retain the option to upgrade the service if cost and demand considerations align.

The Commission also appropriately recognizes that across customer classes and access needs, customer expectations and requirements for broadband Internet access have changed during the past decade and are likely to continue to evolve.⁷ Residential customers who were excited to have DSL service replace their 56 kbps dial-up Internet access now have commercial options that are many times faster and small-to-medium businesses have benefited from more flexible broadband service options. Because of evolving capabilities and demand, and because of real fiscal constraints, the Commission should not try to future-proof access to high speed Internet service. Specifying a basic level of broadband access that is consistent with current user requirements need not stand in the way of the continuing evolution of broadband services. The investment necessary to expand service levels can be accomplished

⁷ See generally, *NOI*, at 2-3, 22.

incrementally. Indeed, cable television and telephony providers have followed precisely this approach to increase the speed of their Internet service offerings. In the vast majority of cases, providers offer different levels of service without incentive or subsidy; and subscribers choose service levels based on the relative utility of different service levels. At the same time, providers receiving support should be required to demonstrate that when they deploy infrastructure with high up-front costs, they have installed sufficient capacity to permit reasonable growth. In most instances, this approach is in the provider's own best interests.

In defining broadband goals and benchmarks, the Commission should avail itself of analysis and data gathering that has been undertaken by other federal agencies. In particular, the General Accountability Office ("GAO") has underway a comprehensive study of broadband metrics.⁸ The Commission may find results of the GAO study useful in describing and ultimately in selecting the appropriate levels of "basic" Internet service needed to participate in the range of activities identified by the Commission (e.g., economic, education, health care, etc.) as reasons for universal access to high speed Internet service.

The broadband goals and benchmarks that come out of this proceeding will necessarily be the same for those communities that are presently "under-served" as for those that are un-served. The wisest and most efficient use of resources may be to first ensure that broadband Internet access is available to un-served communities at least at

⁸ The GAO Report, mandated by the Broadband Data Improvement Act of 2008, Pub. L. No. 110-385, 122 Stat. 4096 (codified at 47 U.S.C. §§ 1301-1304) (BDIA) is due to be filed with Congress in October 2009. BDIA, § 104. In addition to the Commission and the GAO, the BDIA assigns tasks to several other federal agencies (NTIA, the Small Business Administration, and the Census Bureau) in support of the goal of improving data with regard to the deployment and adoption of broadband service. See. *NOI*, Appendix, 7.

public access points where members of an un-served community can come to utilize the service. While not providing an exact model, the U.S. Postal Services (USPS) delivery guidelines for urban versus rural service should be considered as a stepping off point. The USPS has for decades applied different delivery standards on urban and suburban routes (where to-the-door delivery is made) and on rural routes (where to-the-end-of-the-road or to-the-local-post-office delivery is made). Broadband access 'hot spots' deployed at rural gathering spots (post-offices, general stores, gas stations, libraries, etc.) may be a good first step. The Commission should beware of setting deployment goals, particularly for sparsely un-served rural areas that are unachievable and that ultimately hamper getting broadband to the most people most quickly.

B. No intervention should occur before the Commission assesses the current availability of access to high speed Internet service.

Before the Commission can formulate a plan for improving the availability of high speed Internet service, it should carefully assess existing deployment levels, service offerings, and subscription choices. The Commission has taken several initial steps toward assessing the status of broadband deployment, including expanding the scope of the data collected on its Form 477,⁹ and is coordinating its efforts with other federal agencies that have been tasked with collecting relevant information on broadband services.¹⁰ The Commission should place high priority on completing ongoing mapping

⁹ Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscribership, 23 FCC Rcd 9691 (2008) (2008 Data Gathering Order).

¹⁰ See NOI Appendix, describing broadband-related directives to various agencies pursuant to recent federal statutes, including the Recovery Act, the 2008 Farm Bill, and the Broadband

and data collection effort before it intervenes to advance broader availability of high speed Internet service.¹¹ Otherwise, it risks launching an effort that is not cost-effective. Although some areas are un-served or under-served, these areas have become the exception rather than the rule.

The Commission then can identify key areas where broadband deployment has lagged and the reasons why. For instance, with a comprehensive inventory in place, the Commission can distinguish between communities that are under-served because their location or topography results in high costs and communities that are underserved for other demographic reasons (e.g., low-income).

The Commission's own broadband surveys show that cable or telephone company broadband services are available to a substantial portion of all households.¹² Increasingly, the incumbent telephone and cable companies offer residential broadband Internet service and offer promotions for their multi-service bundles. In fact, offering broadband Internet service becomes a matter of competitive necessity, as neither telephone companies nor cable companies are willing to cede the telephone-Internet-video bundle business to the other. Where this is occurring, there is no need to create

Data Improvement Act. In addition, the Commission has recently released a report focusing on the status of rural broadband. Bringing Broadband to Rural America: Report on Rural Broadband Strategy, FCC, May 22, 2009.

¹¹ The Commission should consider requiring all recipients of USF high-cost funds to submit basic data identifying the number of households to which they provide basic telephone service, the number of households to which they offer broadband access, and the kinds (speeds) of broadband access available from the ILEC. This information should be readily available, and will provide a quick snapshot of the percentage of rural households that do have at least ILEC broadband service available

¹² The Commission's most recent report (June 2008) in its ongoing Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, Docket GN 07-45, 25 FCC Rcd 9615, (2008), documents ongoing progress in availability of and subscription to broadband services. That report is a year old and presumably is due to be updated shortly. AdHoc expects that the 2009 report will again reflect significant growth in broadband service.

additional incentives for broadband deployment; market forces will expand the availability of high speed Internet service offerings.

Similar experience with competitive broadband investments (outside of rural areas) is occurring in Canada. In a recent regulatory submission, MTS Allstream (the ILEC in Manitoba, but Canada's largest CLEC outside that province) stated: "In order to retain and attract customer in the residential market, the [large ILECs, Bell, and TELUS] will be compelled to invest in response to cable competition *where that competition exists*."¹³ In support of this conclusion, MTS Allstream cites to a statement from the BCE Inc. (Bell Canada) 2008 Annual report that "[c]able companies have aggressively rolled out Internet networks offering higher speeds to their customers, forcing us to incur significant capital expenditures in order to also be able to offer higher speeds on our networks,"¹⁴ and another from BCE's 2006 Annual Report expressing concern that were it to slow the deployment of FTTN facilities (relative to the existing business plan) "our broadband ISP churn rate could increase beyond our current expectations, thereby adversely affecting our expected number of Internet subscribers."¹⁵

Where high speed Internet service is unavailable and the Commission determines that a subsidy is required, it should subsidize only a single provider in order to maximize the scope and capacity of that provider's network in the affected area. The

¹³ Response of MTS Allstream to 11 March 2009 Petitions of Bell Canada and Bell Aliant and TELUS Communications Company to the Governor in Council (DGTP-004-09), filed May 4 2009, at 4. MTS acknowledges that the large ILECs "will not face the same degree of [broadband service] competition in rural markets. Thus, if Bell and TELUS were threatening to withdraw investment solely from rural and high-cost serving areas, this could be a more plausible scenario that would affect the rollout of [Net Generation Networks]. However, this is not the focus of their petitions: the Applicants are clearly talking about urban areas. Accordingly, the question is not investment, but simply the timing of that investment.

¹⁴ *Id.* at 15.

¹⁵ *Id.* at 19.

Commission should use a reverse auction mechanism to identify a single least-cost provider to receive the required subsidy. This approach should be technology neutral. Any provider using any proposed platform should have an opportunity to vie for USF support.

Providing support for multiple platforms when the market has failed to produce any investment in the absence of subsidy would be an inefficient use of public funds. Deployment of multiple platforms in markets that have failed to produce or support even a single provider to date will, of necessity, result in a lower level of demand for each provider (since the demand will be split) and, as a result, a correspondingly higher cost of providing service to each. Taking a step back and looking at some of the fundamental economics underlying the provision of last-mile telecom services – services characterized by high up-front fixed costs – demonstrates why supporting multiple platforms is not in the public interest. Figure 1 below illustrates an average cost curve for a product with a declining average cost. As the quantity of units produced / demanded increases (moving to the right along the x axis), the average cost per unit decreases. Representations of cost curves of this kind can be found across a broad range of economics textbooks depicting the cost characteristics of “natural monopolies.”¹⁶ The data depicted on Figure 1 reveals the outcome of two separate broadband deployment scenarios:

- A market with a single provider able to provide service at cost/price point “A” on the cost curve; and
- A market with the same total demand split between two providers who are

¹⁶ See, e.g., Mansfield, Edwin, *Microeconomics, Theory & Applications*, WW Norton & Company, Inc. New York, 1970.

only able to provide service at higher cost/price point “B” on the cost curve.

As the graphic clearly illustrates, a decision to fund multiple broadband platforms in geographic markets where the costs are already so substantial that a single provider has yet to build the necessary infrastructure (suggesting it is on the high cost / low demand end of the cost curve) will result in multiple providers each of which will face a still higher cost of providing service. To the extent that universal service subsidies are required to allow providers to lower their broadband Internet access prices to “affordable” levels to customers, a decision to deploy multiple platforms will require that measurable more “subsidy” per subscriber is required.

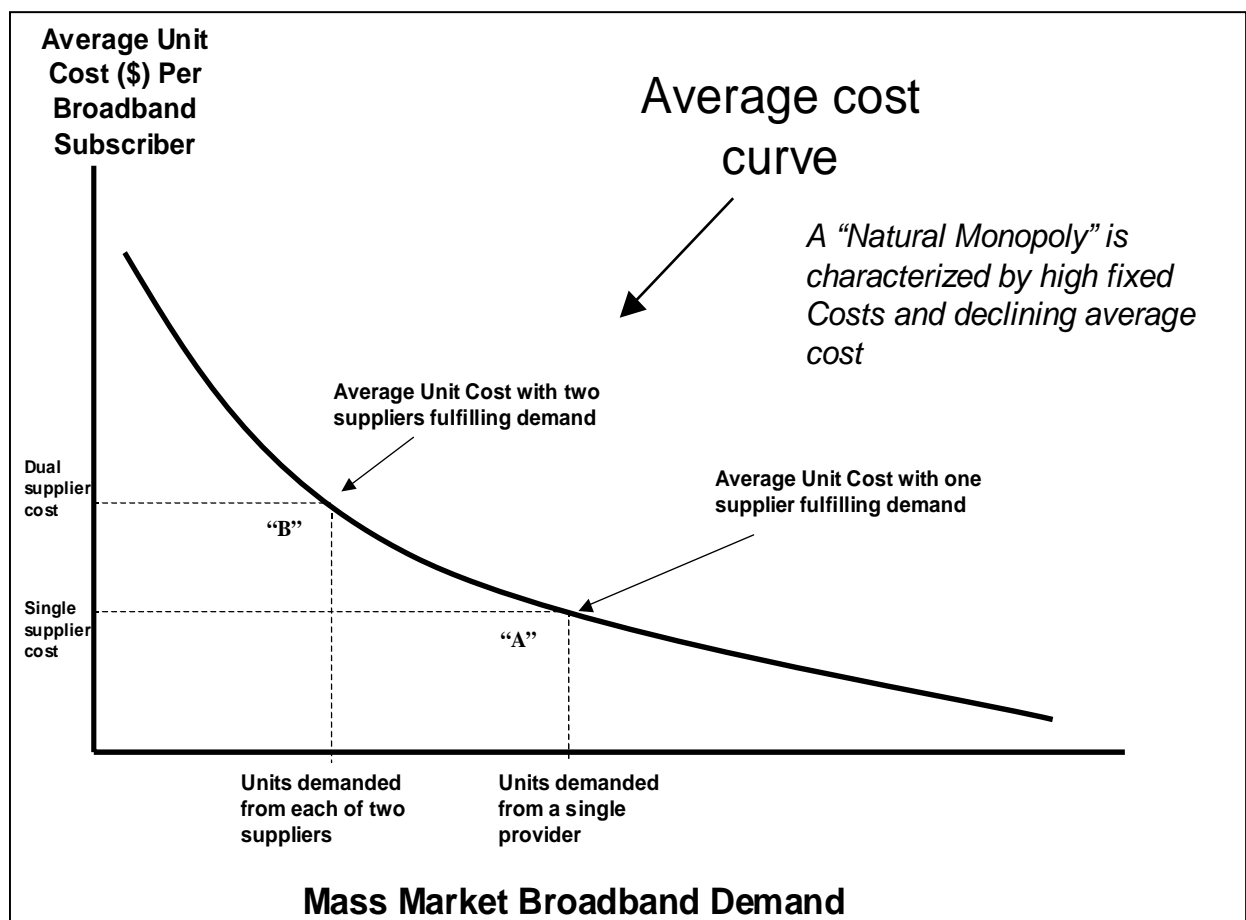


Figure 1

While some will undoubtedly dispute the characterization of the market for mass market broadband services as exhibiting “natural monopoly” characteristics, there is a very real likelihood that the market for broadband facilities does exhibit these characteristics – particularly in rural markets.¹⁷ Unless and until the Commission has obtained sufficient information about the natural cost characteristics of these markets it would be irresponsible to begin down a path that could ultimately result in higher costs (and the need for larger universal service subsidies down the line) in rural markets.

The existence of cost characteristics like those depicted in Figure 1 illustrate that it is possible, indeed likely, that there will be geographic markets in which a single provider is the only efficient and economically rational solution (*i.e.*, facilities-based competition is not supportable). In these areas it becomes all the more important that the Commission promote competition on a non-facilities basis, by requiring open network access.

III. Experience Teaches that the ILECs Have Little Incentive to Deploy Broadband Infrastructure Absent Competitive Pressure

The ILECs will undoubtedly claim that requirements for open network access or wholesale regulation of the underlying broadband facilities will cause them to stop all future investment, and that broadband deployment will occur only if they are allowed an unfettered ability to operate the broadband facilities as they please and to change as

¹⁷ Even if the average cost curve exhibits tendencies more like those seen in typically competitive industries (where the average cost of providing service bottoms out at a level that allow for multiple providers to exist at the same point on the average cost curve) in urban and suburban markets, it is likely that the total demand for service in rural markets will occur at some point on the downward slope of the cost curve – meaning that the introduction of an additional supplier will result in a higher average cost for all suppliers.

they please. The FCC must listen to such claims with a careful ear, and look to the past experience of state regulators facing the same claims in evaluating their veracity

ILEC claims that reduced regulation would result in increased network evidence go back at least 20 years. In 1992 Verizon (then Bell Atlantic or “BA-NJ”) proposed an accelerated network modernization program entitled Opportunity New Jersey (“ONJ”) as an integral part of a five year plan for alternative regulation.¹⁸ Under the terms of the ONJ plan, BA-NJ committed to accelerate its planned deployment of advanced network technologies and services, in exchange for adoption of its proposed alternative form of regulation. While BA-NJ reaped significant financial benefits from the ONJ plan, it did not reinvest those returns in its infrastructure. BA-NJ actually disinvested some \$76-million between 1993 and 1995.¹⁹ Five years later, in 1997, the New Jersey Ratepayer Advocate reported that BA-NJ actually invested \$545-million less in New Jersey than the level that had been forecasted under the ONJ, and in capital-dollar terms, overall capital expenditures had decreased under ONJ.²⁰

Several other jurisdictions also documented the ILECs failure to live up to their capital investment promises. In 1999, the Indiana Utility Regulatory Commission concluded that Ameritech (now part of AT&T) had reneged on an infrastructure investment commitment made in connection with the 1994 “Opportunity Indiana” price

¹⁸ See, Application of New Jersey Bell Telephone Company for Approval of its Plan for an Alternative Form of Regulation, New Jersey BPU Docket No. TO92030358, Decision and Order, May 6, 1993 at 1; 73-75, 87-98.

¹⁹ See, Economics and Technology, Inc. Whitepaper, A New Opportunity: Cost Based Pricing of Bell Atlantic - New Jersey Access Services, March 1999, at 6, NJ BPU Docket No. TO92030358..

²⁰ *The Board's Inquiry into Bell Atlantic-New Jersey, Inc.'s Progress and Compliance with Opportunity New Jersey, its Network Modernization Program*, NJ BPU Docket No. TX96100707, *Order Approving Stipulation*, June 10, 1997, at 5, citing *Division of Ratepayer Advocate Brief*, at 15-16.

cap regulation program.²¹ Ten years after the New Jersey “promise” was made, in 2002, the Pennsylvania Public Utilities Commission found that Verizon had not fulfilled commitments it had made in Pennsylvania as part of a similar plan.²² In 2004, after reviewing Qwest’s compliance with capital expenditure commitments that had been made as part of a regulatory bargain the New Mexico Public Regulation Commission concluded that Qwest’s level of investment was “significantly below its obligation.”²³

The Commission recently sent inquiries to the telecom regulators in several countries that are widely viewed as having successful broadband deployment levels requesting specific details on how ubiquitous broadband deployment actually is in those countries.²⁴ More important than actual deployment levels are questions as to how that deployment was stimulated and how the companies providing service are regulated – questions that were not included in the Commission’s correspondence.

Regulators in other parts of the world have taken a more active role in regulating and ensuring wholesale access to broadband facilities than is occurring in the U.S. today. A recent International Telecommunications Union (ITU) report (*Six Degrees of Sharing*) concluded that requiring sharing of network facilities (referred to in the U.S. as ‘open access’ or ‘wholesale unbundling’) was the best approach to ensure broadband deployment in developing countries. “The single biggest reason to adopt sharing is to

²¹ *Petition of Indiana Bell Telephone Company, Incorporated d/b/a Ameritech Indiana, for the Commission to Decline to Exercise in Whole or in Part its Jurisdiction Over, and to Utilize Alternative Regulatory Procedures for, Ameritech’s Provision of Retail and Carrier Access Services Pursuant to I.C. 8-1-2.6 et. seq.*, Indiana Utility Regulatory Commission Cause No. 40849, approved April 28, 1999, at 2.

²² *Verizon Pennsylvania, Inc., Petition and Plan for Alternative Form of Regulation Under Chapter 30; 2000 Biennial Update to Network Modernization Plan*, P-00930715, Order, March 28, 2002.

²³ New Mexico Public Regulation Commission Media Release, “Public Regulation Commission Orders Qwest to Invest,” March 8, 2005, available at: <http://www.nmprc.state.nm.us/pdf/qwestafor.pdf>,

²⁴ See May 14th, 2009 letters from John Giusti, Acting Chief of the International Bureau of the FCC to regulators in South Africa, Singapore, South Korea, Hong Kong, Japan, Nigeria, Canada and Australia.

lower the cost of deploying broadband networks to achieve widespread and affordable access to ICTs.”²⁵

Sharing of the kind envisioned in the ITU report has already been mandated by regulators in other parts of the world. In 2005, Ofcom, the U.K.’s equivalent of the FCC, reached an agreement with British Telecom requiring it to be functionally separated into two separate entities: the result was a regulated wholesale entity (“OpenReach”) and a non-regulated retail company.²⁶ As BT’s Chairman Sir Michael Rake recently commented in an interview with the Washington Post, “It was painful at the time but has been better for the country and consumers in the long run.” Rake continued, “There needs to be a level playing field and the simple thing to do to achieve that is to open access. It’s the only way to create competition and thereby create investment and jobs.”²⁷ Governments in both Italy and New Zealand adopted functional separation policies similar to that implemented in the U.K. shortly thereafter.²⁸ More recently, faced with ongoing resistance by Telstra (the Australian incumbent) to any “open access” requirement, the Australian government chose not to simply give in – choosing instead to call Telstra’s bluff. In April of this year, the government announced plans to spend \$30-billion to build a nationwide broadband infrastructure itself, with full open access to competing retail service providers that will be privatized after five years of

²⁵ *Trends in Telecommunications Reform 2008: Six Degrees of Sharing* International Telecommunications Union, November, 2008 at 29.

²⁶ “*Six Degrees of Sharing*” at 144 – 145.

²⁷ http://voices.washingtonpost.com/posttech/2009/05/british_telecom_chairman_rake.html

²⁸ “*Six Degrees of Sharing*” at 144 – 145.

operation.²⁹ Almost immediately, Telstra came forward, suggesting that perhaps it would be willing to accept functional separation.³⁰

The international plans referenced above all go far beyond anything contemplated in the *NOI*. However, as the Commission explores how to ensure that the US public has access to the best broadband facilities possible, all options should be on the table and the experience of the rest of the world should be closely examined. The comments that will be filed by the incumbent US carriers will undoubtedly contain claims that any open access requirements will inhibit any incentive to further deploy broadband facilities. Past experience in the US and around the world indicates that the Commission should not take those claims at face value.

IV. Implications of Market Failure for the Availability of High Speed Internet Service

The Commission would likely agree that (1) it would be best if market demand and competitive pressure made high speed Internet service available throughout the Nation, and (2) that in some geographic areas government intervention will be required in place of market forces to make high speed Internet service available, (*i.e.*, market failure). The Commission also should recognize that the same market failure will continue to exist after expenditure of USF or other government funds, and will require regulatory intervention because market forces will not protect consumers from abusive pricing and practices in connection with a service infused with the public interest. It would be irresponsible, to provide increased government subsidies to extend and

²⁹ http://www.dbcde.gov.au/communications/national_broadband_network

³⁰ "Telstra open to break-up as broadband plan forces telecom to overhaul strategy", *The Australian*, April 14, 2009. Accessed at April 14, 2009 at <http://www.theaustralian.news.com.au/story/0,25197,25330985-5013871,00.html> .

improve broadband Internet access service to un-served and under-served areas and to then rely on a failed market to produce reasonable and affordable rates for those same services.

Determining the form and extent of regulatory intervention is, however, a more difficult matter. The Commission's *BWIA* decision may make rate regulation of high speed Internet service at least questionable.³¹ In that case the Commission held that mass market broadband Internet service is not a telecommunications service subject to economic regulation under Title II of the Communications Act, as amended. The Commission's holding goes to "bundled" broadband Internet service, not to the underlying broadband facilities themselves. If the Commission were to compel entities offering high speed Internet service to offer on a wholesale basis unbundled access to the broadband facilities needed to provide mass market broadband Internet service, the Commission could legally regulate the rates, terms and conditions under which the wholesale unbundled access offerings would be made. This approach to regulation would increase the odds that competition for high speed Internet service customers would develop at the retail level even in markets where only one or two facilities-based broadband access providers exist. If the Commission were to conclude subsequently that competition at the retail level has not developed, it could seek legislation giving it

³¹ *Appropriate Framework for Broadband Access to the Internet over Wireless Facilities, Universal Service Obligations of Broadband Providers, Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services, Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements, Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises, Consumer Protection in the Broadband Era, CC Docket No. 02-33, CC Docket No. 01-337, CC Docket Nos. 95-20, 98-10, WC Docket No. 04-242, WC Docket No. 05-271, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005) ("BWIA Order").*

authority to regulate the rates, terms and conditions under which high speed Internet access service, a service infused with the public interest, is offered.

V. Effective Oversight Would Maximize Access To Broadband Internet Service.

For over ten years, the Commission's oversight of the USF and carrier expenditures, operations and rates has been inadequate. The Commission has been hoping for a robustly competitive telecommunications market, but those hopes have been only partially realized. That hope perhaps has resulted in the Commission not doing all that it should have done to assure maximum availability of broadband Internet service. The past will be prelude to the future unless the Commission changes course.

A. The Commission Should Exercise More Effective USF Oversight

In 2008 the Commission's Office of Inspector General released three reports on statistical audits of the Universal Service Administrative Company's (USAC) operation of the USF.³² All three reports show high degrees of improper payments, as defined by the Improper Payments Information Act of 2002. For example, the High Cost audit estimated that 23.3%, or \$970.3 million, of USF High Cost payments during the audit period were "improper," and that over 98% of the improper payments were over payments. The audit raises numerous follow on questions. Assuming the correctness of the audit, where did the excessive payments go? Were the payments used

³² Office of Inspector General, FCC, *The High Cost Program Initial statistical Analysis of Data from the 2007 / 2008 Compliance Attestation Examinations*, November 26, 2008 (High Cost Audit); *The Schools and Libraries Program Initial Statistical Analysis of Data from the 2007 / 2008 Compliances Attestation Examinations*, December 12, 2008; *Assessment of Payments Made Under the Universal Service Fund's Low Income Program*, December 12, 2008.

exclusively to provision, maintain and upgrade facilities services eligible for High Cost support? Although section 54.314 of the Commission's Rules requires state regulatory authorities to certify that payments were only used for eligible services, to the best of AdHoc's knowledge the Commission has never audited the accuracy of state certifications. Indeed, footnote 59 in the High Cost Audit states that the Commission relies on the certification made to USAC by state regulatory authorities. What steps have state authorities taken to verify the accuracy of their certifications? Have state authorities relied on carrier representations and data because at least some state authorities may lack the resources to audit carrier representations and data, and perhaps the incentive to question data used to bring more USF money into the respective states? Does USAC audit these certifications? Has USAC's oversight of this part of the High Cost Program also been deficient? Moreover, what expenditures fall within the descriptors provision, maintain and upgrade? What if a portion of the USF disbursements simply enhance the profits of the owners /operators who provision, and maintain plant? Have the USF disbursements then been used to support only eligible services? Can USF supported plant also be used to support video transmission capabilities that are used to compete with cable television systems? Undoubtedly other reasonable questions could be posed regarding USF High Cost disbursements.

The Commission should be able to answer these kinds of questions about USF High Cost payments already made, and should have a clearer set of limits and more robust enforcement programs before it authorizes potentially even greater High Cost subsidies for access to high speed Internet service. Advancing the availability of high

speed Internet access is too important for USF High Cost payments to be used unproductively.

B. Deregulation Of Special Access Rates Has Undermined Efforts To Make High Speed Internet Service More Affordable And Available.

The Commission's hands-off approach to special access rates over the preceding eight years has increased the cost of high speed Internet service in rural areas. AdHoc repeatedly has demonstrated that the BOCs' interstate special access rates are excessive by showing that the BOCs' earnings from those services grossly exceed levels that would be considered reasonable.³³ BOC assertions to the contrary are without merit.

Rural telephone carriers recently have explained that the BOCs' excessive special access rates deleteriously affect the availability of high speed Internet service in rural areas.

Increasing special access transport costs to the Internet backbone can harm rural consumers and RoR carriers and the problem worsens when those carriers must purchase special access services from large vertically integrated companies to connect their customers to the Internet backbone. These costs as well as the IP costs associated with the middle mile and the Internet backbone itself are significant costs of providing broadband service in rural areas and must be addressed in any comprehensive reform. To achieve and maintain the goal of universal affordable broadband service for all Americans, the Commission should regulate the terms, conditions and prices of Internet backbone services, *including special access transport* needed to reach the Internet backbone, to ensure that large, vertically-integrated Internet

³³ See, e.g. Comments of the AdHoc Telecommunications Users Committee, RM No. 10593 (*AT&T Petition for Rulemaking Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*), Dec 2, 2002; Reply Comments of the AdHoc Telecommunications Users Committee, WC Docket No. 06-120 (*Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) with Regard to Certain Dominant Carrier Regulation for In-Region, Interexchange Services*), August 8, 2006.

backbone providers do not abuse their market power by imposing unfair and discriminatory pricing on small, rural, communications carriers providing retail high-speed Internet access service in rural, insular and high-cost areas of the United States.³⁴

Market forces will not better align the BOCs' special access rates with the relevant underlying costs. In addition to AdHoc filings, at least two public bodies have found that the level of competition in the special access market is extremely limited.³⁵ Special access facilities are in the overwhelming share of geographic locations bottleneck facilities over which the BOCs exercise *de facto* market power. Of course the BOCs' excessive returns from interstate special access service support this conclusion.

Nevertheless, in a decision that AdHoc believes cannot rationally be explained, the Commission last year conditionally granted BOC petitions seeking forbearance relief from certain Commission cost assignment rules.³⁶ The Commission affirmed an earlier decision that the BOCs possess exclusionary market power, and then correctly concluded that because of that market power it has continuing regulatory responsibilities.³⁷ Despite the finding and conclusion and the relevance of cost allocation data to ongoing proceedings, the Commission by a bare majority decided that

³⁴ National Telecommunications Cooperative Association, *Ex Parte* letter in CC Docket No. 01-92 and WC Docket No. 04-36, at 7, September 12, 2008 (Footnotes omitted; emphasis added).

³⁵ See, *Competitive Issues In Special Access Markets*, Peter Bluhm and Dr. Robert Loube, NRRI, January 2009. NRRI (the National Regulatory Research Institute); Committee on Government Reform, House of Representatives. Report to the Chairman, *FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services*, GAO-07-80 (November 2006).

³⁶ *Petition of AT&T Inc. for Forbearance under 47 U.S.C. § 160 from Enforcement of Certain of the Commission's Cost Assignment Rules*, WC Docket Nos. 07-21, 05-342, 23 FCC Rcd 7302 (2008) (*AT&T Cost Assignment Forbearance Order*), *pet. for recon pending*, *pet. for review pending*, *NASUCA v. FCC*, Case No. 08-1226 (D.C. Cir. Filed June 23, 2008); *Service Quality, Customer Satisfaction, Infrastructure and Operating Data Gathering*, WC Docket Nos. 08-190, 07-139, 07-204, 07-273, 07-21, 23 FCC Rcd 13647 (2008) (*Verizon/Qwest Cost Assignment Forbearance Order*), *pet. for recon. pending*, *pet. for review pending*, *NASUCA v. FCC*, Case No. 08-1353 (D.C. Cir. filed Nov. 4, 2008) (collectively the *Forbearance Orders*).

³⁷ *AT&T Cost Assignment Forbearance Order*, ¶¶ 21, 27.

instead of requiring that the BOCs assign their costs pursuant to Commission Rules, the BOCs could propose their own cost allocation plans.³⁸ Approval of the BOCs' plans was to be a condition precedent to the effectiveness of the forbearance relief granted the BOCs.³⁹ The Wireline Competition Bureau (WCB) subsequently approved the BOCs' patently deficient cost assignment plans in a one paragraph Public Notice that did not address any of the many objections to the BOCs' cost assignment plans.⁴⁰ AdHoc and other parties have sought (1) reconsideration of the order conditionally granting the BOCs forbearance relief from Commission cost assignment rules and (2) Commission reversal and vacatur of the WCB's approval of the BOCs' so-called cost assignment plans.⁴¹

The Commission must adjust its price caps rules to bring special access rates to levels that would prevail in an effectively competitive market. Adjustment of those rules must account for carrier earnings from special access service. This adjustment would not constitute a return to cost-of-service regulation. Rather, the adjustment would use relevant data as a check to determine whether the price caps rules were producing the results that would be expected in a competitive market. Failure to do so will undermine making access to high speed Internet service more widely available, reasonably priced and affordable.

Moreover, the Commission should reinstitute meaningful cost assignment rules to assure that entities that receive money to construct broadband plant use the money

³⁸ *Id.* at ¶21.

³⁹ *Id.* at ¶21.

⁴⁰ FCC Public Notice DA 08-2827.

⁴¹ AdHoc, COMPTTEL, Sprint Nextel Corporation, Time Warner Telecom, Inc, Petition for Reconsideration, WC Docket Nos. 07-21, 05-342, May 27, 2008; AdHoc, COMPTTEL, Application for Review of Action Taken Pursuant to Delegated Authority, WC Docket Nos. 07-21, 07-273, 07204, January 30, 2009.

for that purpose and no other purpose. President Obama has promised transparency and accountability with respect to money disbursed pursuant to the American Recovery and Reinvestment Act (Stimulus Bill). The Commission needs to do its part to assure that Stimulus Bill money and any additional USF money is properly accounted for and used only to increase the availability of high speed Internet service.

VI. Conclusion

AdHoc supports well-conceived efforts to make high speed Internet service available in un-served and under-served areas at reasonable rates. To that end, AdHoc urges the Commission to adopt policies consistent with these Comments.

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